Supreme Court, U.S.
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No. 11- ____

IN THE
SUPREME COURT OF THE UNITED STATES

ROBERT J. ISAKSON,
Petitioner,

v.

Scott Custer, Michael Battles,
Custer Battles, LLC, Windmill International, Inc., Danubia Global, Inc., Security Ventures International, Ltd., Amy Clark, Douglas Combs, and Richard Levinson,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

The questions presented are

I. Does Federal Rule of Civil Procedure 37 confer authority unto a district court to implement punitive discovery sanctions against a plaintiff who is neither alleged nor found to have committed any discovery violation?

II. Does a district court's inherent authority permit the court to dismiss a plaintiff's complaint and assess fees against him as sanctions for alleged discovery misconduct by his co-plaintiff, where the plaintiff is neither alleged nor found to have committed any discovery violation, and both plaintiffs, individuals who lack privity with one another?

III. Does the dismissal of a plaintiff's complaint and assessment of fees against him on grounds of the discovery misconduct of another party violate the plaintiff's rights under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution?

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner Robert J. Isakson, through counsel, respectfully petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

Citations of Reports of Orders Below

The unpublished, per curiam opinion of the Fourth Circuit Court of Appeals is reported in *United States ex rel. Mayberry v. Battles et al.*, Appeal No. 08-2191 (4th Cir. May 21, 2010). It is reproduced in full as Appendix C.

Jurisdiction

The Fourth Circuit Court of Appeals' opinion underlying this Petition was decided on May 21, 2010. The Fourth Circuit denied Appellants' petition for rehearing and rehearing *en banc* on August 27, 2010. This Court has jurisdiction by Writ of Certiorari. 28 U.S.C. § 1254(1).

Statutory Provisions

Federal Rules of Civil Procedure 34 and 37 are reproduced as Appendix E.

STATEMENT OF THE CASE

This case has arisen under the federal False Claims Act ("FCA"), 31 U.S.C. § 3729, *et seq.* On April 4, 2006, Relators[1] Rory Mayberry and Robert Isakson filed suit under seal against Defendants Scott Custer, Michael Battles, Custer Battles, LLC ("Custer Battles"), Windmill International, Inc. ("Windmill"), Danubia Global, Inc. ("Danubia" or "DGI"), Security Ventures International, Ltd. ("Security Ventures"), Amy Clark, Douglas Combs, and Richard Levinson. After the unsealing of the Complaint, on November 30, 2007, Mr. Mayberry and Mr. Isakson filed an Amended Complaint against the Defendants in the

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[1] A suit by a *qui tam* relator is a "suit by the United States." *United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Center*, 961 F.2d 46, 48 (4th Cir. 1992). The United States remains the "real party in interest" in False Claims Act *qui* actions, *see, e.g., Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990), and stands to recover 70% or more of the proceeds of any successful suit filed under 31 U.S.C. § 3729, *et seq.* *See id.*

District Court for the Eastern District of Virginia. In principal part, Mr. Mayberry and Mr. Isakson's Amended Complaint alleged that the Defendants violated the FCA by subverting a suspension and subsequent debarment of Defendants Custer, Battles, and Custer Battles from Government contracting so as to allow those Defendants to obtain contracts for which they were ineligible.

Inter alia, prior to their involvement in the Danubia enterprise, Defendants Custer and Battles, through Defendant Custer Battles LLC, operated a business in Iraq and engaged in fraud in the course of doing so, under a currency exchange contract with the Coalition Provisional Authority in Iraq. One vignette from this fraud was described as follows by the Fourth Circuit Court of Appeals in 2009: "Problems developed with the quality of Custer Battles' performance, leading to a meeting on October 18, 2003, between representatives of the Coalition Authority, the U.S. Military, and Custer Battles' co-owners Michael Battles and Scott Custer. After this meeting ended, Battles accidentally left behind an astonishing spreadsheet, which contained rows listing items invoiced under the Dinar Exchange Contract and separate columns listing the 'Actual Cost' for the items and the amounts 'Invoiced' for the items." *United*

States ex rel. DRC, Inc. v. Custer Battles, LLC, 562 F.3d 295, 299 (4th Cir. 2009).

Relators' Amended Complaint alleged that suspended Defendants Custer, Battles and Custer Battles, with the help of Windmill, Combs, Levinson and others, created Defendant Danubia; that Custer Battles' contracts and assets were transferred to Danubia with the suspended Defendants remaining *de facto* principals in Danubia; and that the Defendants then used Danubia to seek or obtain contract extensions and new federal-funded contracts in violation of Defendants Custer, Battles, and Custer Battles' contracting suspension and Federal Acquisition Regulation Subpart 9.4. Defendant Danubia Global did in fact go on to obtain several contracts calling for performance in Iraq and funded, in part, with U.S. federal funds.

On January 17, 2008, the District Court denied four motions filed in December 2007 by the above-noted Defendants[2] seeking

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[2] The Court granted Motions to Dismiss the Amended Complaint as to separately named Defendants Sallyport Global Holdings LLC, John Deblasio, and Joseph Morris, on November 27, 2007. The action was dismissed via consent motion dated February 11, 2008 as to Defendants Rob Roy Trumble, Emergent Business Services and Tarheel

to dismiss the Amended Complaint on various grounds, including that the Amended Complaint ostensibly failed to satisfy Federal Rules of Civil Procedure 9(b) and 12(b)(6). At the close of discovery, on July 15, 2008, Relators moved for partial summary judgment on liability. Relators' summary judgment motion was supported by 109 exhibits, only a handful of which (based on counsel's review, Exhibits 41, 81, 91, 95, 96 and 105) were attributable to Relator Mayberry.

The Defendants also moved for summary judgment on July 15, 2008. On August 15, 2008, with the cross motions for summary judgment pending, Defendants Clark, Levinson, Danubia, and Security Ventures filed an Emergency Motion to Enforce Prior Discovery Orders with the Court. They then filed a related Motion for Sanctions on August 27, 2008. Defendants' Motion to Enforce Discovery Orders and Motion for Sanctions each centered on the alleged discovery misconduct of co-relator Mr. Mayberry, including an assertion that Mr. Mayberry made a misstatement at deposition concerning his date of enlistment in the United States military (stating a date

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Training LLC, pursuant to the terms of a settlement agreement.

of 1980 as compared to 1981).[3] The Defendants also asserted that Mr. Mayberry failed to timely comply with a July 10, 2008 Order issued by the Magistrate (in response to a June 27, 2008 Motion to Compel) requiring that Mr. Mayberry produce a copy of his U.S. military discharge form, as well as, separately, the original electronic devices onto which Mr. Mayberry had copied data relating to the case.

On September 11, 2008, the Magistrate Judge issued a Report and Recommendation regarding Defendants' Motion for Sanctions. The Magistrate concluded that Relator Mayberry had acted contrary to his own attorneys' instructions and in bad faith during the course of discovery. App., *infra*, 19a-20a. The Magistrate found that the information underpinning Mr. Mayberry's alleged discovery misconduct "form[ed] the basis of several of the false claims allegations in the complaint." *Id.* at 21a. The Magistrate Judge did not find that "all" of the false claims allegations in Relators' Amended Complaint were so implicated. The Magistrate recommended that, pursuant to Federal Rule of Civil Procedure 37(a), both

[3] The Defendants illustrated this discrepancy with a half-page chart in their Motion for Sanctions.

Relators Mayberry and Isakson, and their counsel, be adjudged jointly and severally liable to pay reasonable expenses and fees to the Defendants associated with the cost of Defendants' June 2008 Motion to Compel and a related forensic data analysis performed by the Defendants. *Id.* at 23a. The Magistrate Judge further issued two recommendations in the disjunctive: that 1) "relators' claims be dismissed in their entirety, pursuant to Federal Rule of Civil Procedure 37(b)(2)," or, in the alternative, that 2) "relator Isakson not be allowed to produce [at trial] any documents that he received from or through relator Mayberry," and Mr. Mayberry be prohibited from testifying at trial or introducing any documents as evidence at trial. *Id.*

The Magistrate Judge did not find any misconduct on the part of Relator Isakson, nor that Mr. Isakson was aware of any misconduct by Mr. Mayberry. At no point in the proceedings below did the Defendants allege that Mr. Isakson engaged in any discovery misconduct or that he was aware of any discovery misconduct.

On October 10, 2008, the District Court adopted the Magistrate Judge's September 11, 2008 Report and Recommendations. The Court awarded expenses and fees against Relators and their counsel jointly and severally. As to the

Magistrate's separate proposal that the Amended Complaint be dismissed as to both Mr. Mayberry and Mr. Isakson, or, in the alternative, that evidence from Mr. Mayberry be excluded at trial, the Court declined to adopt the less draconian of these two sanctions. Instead, the Court ordered dismissal of the case as to both Mr. Mayberry and Mr. Isakson.

Petitioner appealed the District Court's Order on October 15, 2008, and on May 21, 2010, the Fourth Circuit affirmed. The Fourth Circuit denied a petition for a rehearing *en banc* on August 27, 2010.

REASONS FOR GRANTING THIS PETITION

The Fourth Circuit's *per curiam* affirmance of the decision of the District Court for the Eastern District of Virginia below created a circuit split on the question of whether a court may sanction a party on account of the alleged discovery misconduct of a co-plaintiff with whom the first plaintiff lacks privity. The Second, Eighth, and Eleventh Circuits have all reversed sanctions similar to those imposed here where entered against an innocent party. The Fourth Circuit's opinion below now stands alone as appellate precedent for the proposition that a Court may permissibly impose discovery sanctions, including an assessment of fees,

against a wholly innocent and blameless party.

Petitioner files the instant petition to urge the Court to reverse the judgment of the Court of Appeals and remand the case to the District Court with instructions that the sanctions at issue against Mr. Isakson, described further below, be vacated.

I. FEDERAL RULE 37 DOES NOT SUPPLY A COURT WITH AUTHORITY TO SANCTION A PARTY THAT HAS COMMITTED NO DISCOVERY VIOLATION.

The District Court, in adopting the Magistrate Judge's recommendations, was clear as to the asserted locus for the Court's authority in awarding fees against Mr. Isakson and dismissing the November 30, 2007 First Amended Complaint as to him: Rule 37 of the Federal Rules of Civil Procedure. App., *infra*, 25a ("this comes on the Relators' objection to the report and recommendation from Judge Buchanan recommending the case be dismissed for violations of discovery pursuant to Rule 37."). It is apparent from the plain text of Rule 37 — not to mention all the appellate case law apart from the Fourth Circuit's one

page *per curiam* opinion below[4] — that such Rule does not supply a basis for imposing any form of sanction against a party that has committed no wrongdoing.

As described below, the Second, Eighth, and Eleventh circuits are uniform in holding that Rule 37 does not supply a court with authority to sanction a party that has committed no discovery violation. This sensible conclusion derives from, and is indeed compelled by, the language of Rule 37. The header to Rule 37(b)(2)(A) states "Sanctions in the District Where the Action Is Pending.[:] (A) *For Not Obeying a Discovery Order.*" Fed. R. Civ. Pr. 37(b)(2)(A) (header) (emphasis added). "[T]he Rule requires the issuance of an order to compel and only after failure to comply with that order should a penalty be imposed." *McMullen v. Bay Ship Management*, 335 F.3d 215, 217 (3rd Cir. 2003). As against Mr. Isakson, no such "order" ever issued.

The Second Circuit addressed a fact pattern similar to those of the instant case in the *Daval Steel* decision in 1991, and held it

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[4] The Fourth Circuit's opinion stated merely that "We have reviewed the record and find no reversible error." App., *infra*, 45a.

"improper" to impose sanctions against an innocent party under Rule 37. *Daval Steel Products v. M/V Fakredine*, 951 F.2d 1357 (2d Cir. 1991). In *Daval Steel*, the district court imposed the sanction of default judgment against two defendant companies where the first defendant company, Ecko International Trade Corp. ("Ecko"), had "fail[ed] to produce requested documents," and its attorney "engaged repeatedly at the deposition in behavior designed to thwart the discovery process." *Id.* at 1361. A second corporate defendant, Ekinciler Dis Ticaret ("Ekinciler"), was not accused of any discovery misconduct. The Second Circuit reversed the district court's sanction of default judgment against Ekinciler:

> [Defendant] Ekinciler presents a different case. Although the order compelling discovery need not issue pursuant to Rule 37(a), there must be a valid court order in force before sanctions may be imposed pursuant to Rule 37(b)(2). The court order resulting from the July 11, 1991 hearing was directed only to [defendant] Ekco, the only party to which discovery notices had been directed and the movant of the motion to quash those notices that prompted the hearing.

> *There was no prior order directed to Ekinciler. For this reason, the imposition of sanctions was improper as to Ekinciler, and we therefore reverse the award of sanctions as to it.*

Daval Steel, 951 F.2d at 1364 (emphasis added) (citations omitted).

Eleventh Circuit precedent is consistent with Second Circuit precedent. In a bankruptcy proceeding, where a plaintiff trustee and his counsel were found by the District Court to have violated six discovery orders, and the District Court responded by dismissing the action with prejudice as to *all* creditors of the debtor bank corporation under the aegis of Rule 37,[5] the Eleventh Circuit reversed. *In re Southeast Banking Corp.*, 204 F.3d 1322 (11th Cir. 2000). As stated by the Eleventh Circuit, the District Court for the Southern District of Florida erred by meting out punishment against "innocent parties" that had nothing to do with the discovery misconduct at issue:

> We find that the district court should have used lesser sanctions to resolve the

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[5] *See In re Southeast Banking Corp.*, 212 B.R. 397, 406 (S.D. Fla. 1997).

> problems caused by Brandt's and Bainton's misconduct *without barring innocent creditors from pursuing their claims against Defendants.* As Defendants themselves emphasized throughout the proceedings in this case, Brandt was a trustee of a bankruptcy estate, while Bainton was serving pro hac vice as attorney to Brandt in his role as trustee. This situation raises the concern that innocent parties who were unable to choose their own representatives might be injured *through no fault of their own*... This emphasis on the personal responsibility of the parties-in-interest is reasonable, not only to *preserve the rights of truly innocent parties*, but also because, where a party is personally involved in malfeasance, the likelihood that alternative sanctions will resolve the misconduct is lower.

In re Southeast Banking Corp., 204 F.3d 1322, 1334 (11th Cir. 2000) (emphasis added).

Highly germane to the instant petition, the Eleventh Circuit held that in

order to ensure that "[the] litigation [may] continue" where there is "no evidence" that certain of the represented parties "were involved in misconduct," sanctions "short of dismissal" must be selected:

> Where, as here, there is no evidence that the represented parties, *i.e.*, the creditors, were involved in misconduct, removal of the trustee and/or the trustee's attorney are viable sanctions, short of dismissal, that may resolve misconduct and permit the litigation to continue without further disruption.

Id. at 1334-1335.

Here, it is uncontested that Mr. Isakson had no custody or control over the documents and information that were the subject of the Defendants' underlying motion to compel. In the proceedings below, the Defendants did not even assert that Mr. Isakson was aware of Mr. Mayberry's alleged misconduct. The Defendants did not assert that Mr. Isakson failed to comply with any of his discovery obligations in the case, including, but not limited to, appearing for and testifying at deposition on June 9, 2008. In such circumstances, consistent with the language and intent of Rule 37, a lesser

sanction than dismissal must be imposed, one that will "permit the litigation to continue." *In re Southeast Banking Corp.*, 204 F.3d at 1335.

The Magistrate Judge's Recommendation and Report below acknowledged this principle. The Magistrate Judge recommended as an alternative to outright dismissal against Mr. Isakson that "relator Isakson not be allowed to produce [at trial] any documents that he received from or through relator Mayberry," and that Mr. Mayberry be prohibited from testifying at trial or introducing any documents as evidence at trial. App., *infra*, 23a.

In arriving at the September 11, 2008 Recommendations and Report, the Magistrate Judge cited as precedent the Fourth Circuit's *Mutual Federal Savings and Loan Association* decision. *Mutual Fed. Sav. & Loan Ass'n v. Richards & Associates, Inc.*, 872 F.2d 88 (4th Cir. 1989). App., *infra*, 7a. However, that decision did not supply an actual basis for the outcome ultimately reached in the Magistrate's Report: *Mutual Savings* established that "[b]efore default judgment may be entered, the Court must consider four factors":

> (1) whether the non-complying ***party*** acted in bad faith;

> (2) the amount of prejudice that noncompliance caused the adversary;
> (3) the need for deterrence of the particular sort of non-compliance; and
> (4) whether less drastic sanctions would have been effective.

See id. at 92 (emphasis added). But neither the Magistrate Judge nor the District Court even purported to apply this test as to Mr. Isakson. Of course, the inquiry is a non-starter: Mr. Isakson did not fail to comply with anything, and he did not act in bad faith. Therefore, he could not be sanctioned under Rule 37. The Fourth Circuit recognized that the rationale for conducting the above analysis was to ensure that "only the most flagrant case, where *the party's* noncompliance represents bad faith and callous disregard for the authority of the district court and the Rules, will result in the extreme sanction of dismissal or judgment by default." *Id.* at 92 (emphasis added). *Mutual Federal Savings* itself involved discovery misconduct by multiple defendants, and the Fourth Circuit found that the District Court below had "clearly applied" the applicable standard by finding that "*the defendants* [plural] had acted in bad faith." *Id.* at 93.

The Eighth Circuit Court of Appeals has recognized the paramount principle that

parties to litigation are not indistinguishable for purposes of meting out discovery misconduct sanctions under Rule 37. In a case where one plaintiff had been alleged to have committed discovery misconduct by failing to appear for a deposition, and the district court dismissed the case with prejudice even as to a co-plaintiff who had not committed discovery misconduct, the Eighth Circuit reversed the dismissal. *Hairston v. Alert Safety Light Products, Inc.*, 307 F.3d 717 (8th Cir. 2002). The Court of Appeals noted that even though the District Court had found that the innocent co-plaintiff ostensibly "had no interest in the case because the true nature of the action was one of subrogation," "the district court went beyond the bounds of its discretion in this case...the imposition of lesser sanctions, for example, the assessment of appropriate monetary terms...the striking of pleadings, limitations on discovery or in the admission of evidence, would constitute both an adequate vindication of the district court's orders and a deterrent to any future lack of diligence in complying with discovery requests and trial schedules." *Id.* at 720. Similarly, here, the District Court exceeded its discretion in sanctioning the innocent party Mr. Isakson for the findings of discovery misconduct by Mr. Mayberry.

II. A DISTRICT COURT LACKS INHERENT AUTHORITY TO ISSUE AN ORDER OF DISMISSAL AND AN AWARD OF FEES AS A SANCTION AGAINST AN INNOCENT PARTY.

As noted above, the District Court deemed the locus of its authority to dismiss the Amended Complaint as to Mr. Isakson as deriving from Federal Rule 37. App., *infra*, 25a. In dicta, the District Court stated its view that Mr. Isakson ostensibly "could not have brought this case as a *qui tam* plaintiff without Mr. Mayberry's support in the form of the lies that Mayberry represented to be accurate." App., *infra*, 41a. This would appear to be an expression by the Court of the view that it possessed inherent authority to dismiss the Amended Complaint as against Mr. Isakson on account of Mr. Mayberry's discovery misconduct. In any event, the Court cited no authority for the proposition that Mr. Isakson "could not have brought" his case "without" Mr. Mayberry.[6]

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[6] The notion that Mr. Isakson "could not have brought" his case "without" a co-relator such as Mr. Mayberry conflicts with the very underpinnings of the False Claims Act itself, as noted by the Eleventh Circuit in reversing a district court order limiting the scope of discovery sought by a *qui tam* plaintiff:

Under the False Claims Act, any person may serve as a *qui tam* relator. The relator need not have any relation at all to the defendant. Neither is there a requirement that the relator suffer injury at the hands of the defendant in order to state a claim under the False Claims Act. "The United States is the real party in interest in a qui tam action under the FCA even if it is not controlling the litigation." (citations omitted).

Under the Federal Rules of Civil Procedure, discovery is limited to "matter [s], not privileged, that [are] relevant to the claim or defense of any party .... Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1). Thus, Walker should have been permitted discovery of all information relevant to her claims, on behalf of the United States, that false claims for payment were made by [defendant].

Although a Court's inherent powers are "very poten[t]," "[b]ecause of [such] potency, inherent powers must be exercised with restraint and discretion." *Chambers v. NASCO, Inc.*, 501 U.S. 32, 44 (1991). A reviewing court examines a court's imposition of sanctions under its inherent power for abuse of such discretion. *Id.* at 55. Here, even construing the District Court's sanctions as imposed pursuant to its inherent authority, the District Court quite clearly abused its discretion in fashioning the sanctions that it elected to impose against an innocent litigant (Mr. Isakson).

Fundamentally, no matter how broad a court's inherent powers to sanction litigants may stretch, they are, in fact, bounded quite concretely by separate precedent of this Court where the prospective sanction at issue is that of dismissal. Specifically, this Court has held

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United States ex rel. Walker v. R&F Properties, Inc., 433 F.3d 1349, 1359 (11th Cir. 2005). Indeed, at least one appellate court has held that False Claims Act suits survive even the death of a *qui tam* plaintiff. *United States v. NEC Corp.*, 11 F.3d 136, 139 (11th Cir. 1993) ("The *qui tam* provisions are remedial...We therefore hold that a relator's *qui tam* action survives his death.").

that the sanction of dismissal is to be applied only "when the failure to comply *has been due to...willfulness, bad faith, or any fault of the petitioner.*" *Societe Internationale v. Rogers*, 357 U.S. 197, 212 (1958) (emphasis added). There was, here, no bad faith whatsoever on the part of Mr. Isakson, much less misconduct of any kind.[7] As such, the District Court abused its discretion to the extent it sought to ground the assessment of fees against Mr. Isakson, as well as the dismissal of the Amended Complaint as against him, under its inherent authority.

III. THE SANCTIONING OF AN INNOCENT PARTY ON ACCOUNT OF THE CONDUCT OF ANOTHER LITIGANT VIOLATES THE INNOCENT PARTY'S DUE PROCESS RIGHTS.

The District Court's dismissal of the Amended Complaint as to Mr. Isakson and

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[7] *Accord Beers v. Gen. Motors Corp.*, 97-CV-0482, 1999 WL 325378, at *4 (N.D.N.Y. May 17, 1999) ("dismissal is not limited only to matters where the offending party has acted with bad faith or willful intent, but is permitted where there is any fault *of the sanctioned party.*") (emphasis added) (citing *Bobal v. Rensselaer Polytechnic Institute*, 916 F.2d 759, 764 (2d Cir.1990)).

assessment of fees against him on account of the conduct of Mr. Mayberry violated Mr. Isakson's Due Process rights under the Fourteenth Amendment of the U.S. Constitution. A court may not penalize a party "for a failure to do that which it may not have been in its power to do." *Hammond Packing Co. v. State of Arkansas*, 212 U.S. 322, 347 (1909). This Court has further instructed that:

> A court must, of course, exercise caution in invoking its inherent power, and *it must comply with the mandates of due process*, both in determining that the requisite bad faith exists and in assessing fees.

Chambers v. NASCO, Inc., 501 U.S. 32, 50 (1991) (emphasis added). Discussing the sanction of the imposition of attorney's fees and costs against a party, this Court has recognized that it is not "inequitable to apply the [bad-faith] exception [to the general American Rule against fee shifting] to citizens and noncitizens alike, when the party, by *controlling his or her conduct in litigation*, has the power to determine whether the sanctions will be assessed." *Chambers* at 53 (emphasis added). Thus, the

District Court transparently violated Mr. Isakson's due process rights by sanctioning him, both monetarily and through the outright dismissal of his action, on account of the litigation conduct of a party over whom Mr. Isakson had no control whatsoever.

The District Court's imposition of joint and several sanctions against Mr. Isakson stood basic principles of agency on their head by holding Mr. Isakson liable for the actions of an individual with whom Mr. Isakson was not in privity. Long-standing precedent has recognized that co-plaintiffs are not, in fact, joint venturers, and that their conduct is separable from one another. *E.g., Zaczek v. Fauquier County, Va.*, 764 F. Supp. 1071, 1077-1078 (E.D. Va. 1991) ("The policy of the federal courts is to decide each case on the merits if possible. It is therefore obvious that the plaintiff must engage in some deliberate misconduct before the sanction is applied... A court may find bad faith in the actions that led to the lawsuit or the conduct of the litigation.... In doing so, *a court will necessarily determine the degree to which the plaintiff is personally responsible for the misconduct.*") (emphasis added) (finding that "[t]he plaintiff in this case has clearly abused the judicial process and is personally responsible for his misconduct.").

As to Mr. Isakson, the assessment of fees and dismissal of the Amended

Complaint — as opposed to implementation of the lesser sanction proposed by Magistrate Judge Buchanan — fails to comport with the Due Process Clause of the Fourteenth Amendment. Through its Order of dismissal, the District Court derailed a trial against Defendants against whom a mass of evidence — very little of it involving direct testimony by Mr. Mayberry — confirmed that the Defendants schemed to defraud the United States, and did defraud the United States, in violation of the False Claims Act by circumventing the suspension and debarment of Defendants Custer, Battles, and Custer Battles LLC.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

Victor A. Kubli
Counsel of Record

CERTIFICATE OF COMPLIANCE WITH WORD LIMITS

I hereby certify that the foregoing petition of Robert J. Isakson complies with the word count limit set forth under Supreme Court Rule 33(g)(i) Specifically, the petition contains 3,844 words.

Victor A. Kubli, Esq.

IN THE UNITED STATES DISTRICT
COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
Alexandria Division

RORY MAYBERRY, et al.,
v.
CUSTER BATTLES LLC, et al.,

Civil Action No. 1:06cv364

Sept. 11, 2008

REPORT AND RECOMMENDATION

This matter came before the Court for a hearing on defendants' Motion for Sanctions on August 28, 2008. At that hearing, the undersigned Magistrate Judge heard testimony and argument from both sides and then took the matter under advisement to issue this Report and Recommendation.

I. INTRODUCTION

Pursuant to Federal Rule of Civil Procedure 37, defendants seek an award of sanctions against relators on the grounds that relator Rory Mayberry ("Mayberry") failed to comply with the Court's July 10, 2008 Order to produce his DD-214 discharge

form and the original storage devices on which relator Mayberry claimed to have copied the entire contents of the hard drive of defendant Amy Clark's ("Clark") computer.

In support of the Motion for Sanctions, defendants filed a Brief in Support (Dkt. No. 358) as well as declarations by defendant Scott K. Custer ("Custer Decl." (Dkt. No. 359)) and defendant Clark ("Clark Decl." (Dkt. No. 360)). In opposition to the Motion, relators filed a Pre-Hearing Brief ("Relators' Brief" (Dkt. No. 356)), which included a report and charts compiled by computer forensic expert Stevens R. Miller ("Miller").

II. PROCEDURAL HISTORY

Relators Rory Mayberry and Robert Isakson (collectively, "relators") filed a Complaint against defendants[1] Custer Battles LLC ("Custer Battles"), Scott Custer ("Custer"), Michael Battles ("Battles"), Security Ventures Int'l Ltd. ("Security Ventures"), Danubia Global ("Danubia"), Richard Levinson ("Levinson"), Clark,

[1] Because the Complaint has been dismissed as to Defendants Sallyport, Deblasio, Morris, Trumble, Emergent and Tarheel, the term "defendants" will be used to refer collectively to the remaining defendants Custer Battles, Custer, Battles, Security Ventures, Levinson, Windmill, Johnson, Combs and Danubia.

Windmill International Ltd. ("Windmill"), Hansford T. Johnson ("Johnson"), Douglas Combs ("Combs"), Emergent Business Services ("Emergent"), Tarheel Training LLC ("Tarheel"), Rob Roy Trumble ("Trumble"), Sallyport Global Holding LLC ("Sallyport"), Joseph Morris ("Morris"), and John Deblasio ("Deblasio") on April 4, 2006. On June 15, 2007, the United States of America notified the Court that it was not going to intervene in this matter (Dkt. No. 20). Pursuant to two Orders by The Honorable Liam O'Grady, relators' Complaint was dismissed as to defendants Sallyport, Deblasio and Morris on November 27, 2007 (Dkt. No. 146) and defendants Trumble, Emergent and Tarheel on March 12, 2008 (Dkt. No. 228).

On June 27, 2008, defendants Clark, Levinson, Danubia and Security Ventures moved to compel relators to produce certain documents that relators had failed to produce despite several requests by defendants. Specifically, defendants sought (1) the DD-214 military discharge form of relator Mayberry and (2) a complete copy of the data storage devices containing data relevant to this action. On July 10, 2008, after relators failed to file a timely response, the undersigned Magistrate Judge granted defendants' Motion to Compel and ordered relators to produce the DD-214 form, a complete copy of the storage devices, and the original hard drive from defendant Clark's computer for forensic inspection by July 16,

2008. (Dkt. No. 296). Notably, the Court's July 10, 2008 Order for production specifically informed relators that failure to comply with the Order could result in sanctions, including dismissal of the action.

On July 16, 2008, relators filed a Notice of Compliance with the July 10, 2008 Order stating that they had produced the only storage device in relator Mayberry's possession. (Dkt. No. 318). Accompanying that Notice was a Declaration by Rory Maberry ("Mayberry Decl. 1"),[2] in which he stated, under penalty of perjury, that the flash drive that had just been produced was the original storage device onto which he had copied files from defendant Clark's hard drive.[3] (Mayberry Decl. 1 ¶ 11.) Relator

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[2] There are two relevant declarations by relator Mayberry at issue. The Court will refer to the Declaration dated July 16,2008 as "Mayberry Decl. 1" and to the Declaration dated August 22, 2008 as "Mayberry Decl. 2." Mayberry Decl. 1 was filed with Relators' Notice of Compliance (Dkt. No. 318) and Mayberry Decl. 2 accompanied Relator Maybeny's Pre-hearing Brief (Dkt. No. 356).

[3] Specifically, relator Mayberry stated in his July 16, 2008 Declaration: "When requested by my attorneys, I got the original memory stick that I had sent to the U.S. from Iraq. I then provided that to my attorneys for its

Mayberry also stated in his July 16, 2008 Declaration that he had produced a copy of the DD-214 discharge form requested by defendants, but had discovered that the form was inaccurate. (Id. ¶ 12.) According to relator Mayberry, he had requested a new, accurate DD-214 form from the U.S. Military Records Office in Missouri, but had not yet received it. (Id. ¶ 13.)

On July 25, 2008, the undersigned Magistrate Judge held a hearing in which relators' Rule 72 Objections to the July 10 Order were addressed.[4] At the hearing, relators reiterated that they did not have a correct version of relator Mayberry's DD-214 discharge form, but would produce the corrected version as soon as relator Mayberry received it. Secondly, relators objected to the Court's order to produce the original hard drive from defendant Clark's computer in Iraq. Relators notified the Court that they never had the original hard drive, but asserted that they had produced the original storage device, onto which

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production/inspection." (Mayberry Decl. 1 ¶ 11.)

[4] On July 18, 2008, relators filed a Motion for Rule 72 Objections (Dkt. No. 324) to the undersigned Magistrate Judge's July 10, 2008 Order, which the Court treated as a Motion to Reconsider and took under advisement at the July 25, 2008 hearing.

relator Mayberry allegedly had copied all of the files from defendant Clark's hard drive.

III. LEGAL ANALYSIS

A. Rule 16 and Rule 37 Standards

Pursuant to Federal Rule of Civil Procedure 16(f), "the court may issue any just orders, including those authorized by Rule 37 (b) (2) (A) (ii) - (vii), if a party or its attorney: . . fails to obey a scheduling or other pretrial order." Fed. R. Civ. P. 16(f) (1).

Additionally, if a party fails to obey an order to provide discovery, Federal Rule of Civil Procedure 37(b), authorizes the Court to issue further just orders, including: i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action; (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence; (iii) striking pleadings in whole or in part; (iv) staying further proceedings until the order is obeyed; (v) dismissing the action or proceeding in whole or in part; (vi) rendering a default judgment against the disobedient party; or' (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination." Fed. R. Civ. P. 37(b) (2) (A). Indeed, the Court has

"nearly unfettered discretion to control the timing and scope of discovery and impose sanctions for failures to comply with its discovery orders." *Hinkle v. City of Clarksburg, W. Va.*, 81 F.3d 416, 429 (4th Cir. 1996).

In determining whether a particular sanction is appropriate under Rule 37, the Court considers the following four-part test: (1) whether the noncomplying party acted in bad faith; (2) the amount of prejudice his noncompliance caused his adversary, which necessarily includes an inquiry into the materiality of evidence he failed to produce; (3) the need for deterrence of the particular sort of noncompliance; and (4) the effectiveness of less drastic sanctions. *Mutual Federal Savings & Loan Ass'n v. Richards & Associates, Inc.*, 872 F.2d 88, 92 (4th Cir. 1989).

IV. FINDINGS OF FACT

Throughout the pendency of this matter, relator Mayberry has made multiple false representations to the Court and consistently failed to comply with defendants' requests and the Court's orders to produce an accurate copy of the DD-214 discharge form as well as the original data storage devices containing the files that relator Mayberry allegedly copied from

defendant Clark's hard drive in Iraq during the summer of 2005.

The bulk of relators' claims in this action are based on documents that relator Mayberry claims to have copied from defendant Clark's computer during the period of June 23, 2005 to August 4, 2005. Relators allege in their Amended Complaint ("Amended Compl." (Dkt. No. 149)) that these documents contain "incriminating evidence" from defendant Clark's computer of a conspiracy by defendants to submit false claims for payment to the United States Government. (Amended Compl. ¶¶96, 155.) Incredibly, however, relators have yet to produce any reliable evidence from a credible source of the alleged documents from defendant Clark's computer.

On July 10, 2008, the undersigned Magistrate Judge explicitly ordered relators to produce the original storage device containing the relevant documents. In response to that Order, relators produced a 1 GB USB "flash drive" ("July flash drive"). On July 16, 2008, relators filed a Notice of Compliance with the Court's July 10 Order notifying the Court that the storage device had been produced. In support of the Notice of Compliance, relators submitted Mayberry Decl. 1, in which relator Mayberry stated, under penalty of perjury, that he had provided the "original memory stick" to his attorneys for production. (Mayberry Decl. 1 ¶ 11.) At the July 25, 2008 hearing, relators'

counsel reiterated to the Court that the flash drive that had been produced was indeed the original storage device. (Hr'g Tr. 10:13-11:25, July 25, 2008 (Dkt. No. 333).)

Relators' counsel now admits that the assertions made at the July 25 hearing that the flash drive produced was the original storage device were false. (Hr'g Tr. 91:14-18; 96:11-16, Aug. 28, 2008 (Dkt. No. 361)). The July flash drive was, in fact, not the original storage device. (See Id.) Two computer forensic experts have examined the July flash drive and determined that the entire contents were copied onto the drive on July 14, 2008. Thus, the July flash drive cannot be the original storage device that relator Mayberry copied files onto in the summer of 2005. In fact, relator Mayberry filed a false Notice of Compliance on July 16, 2008, and falsely declared that he had provided the "original memory stick" to his counsel for inspection and production. (See Mayberry Decl. 1. ¶ 11.)

Relator Mayberry's most recent assertion is that he did not produce the original storage device in response to the Court's July 10, 2008 Order because some of the documents that were on the original storage device were privileged. Indeed, in his latest Declaration to the Court, dated August 22, 2008, Relator Mayberry claims to have relied on directions that he previously received from his counsel instructing him not to produce certain documents pertaining to a

similar case against KBR as an excuse for why he failed to obey the Court's order to produce the original storage device. (Mayberry Decl. 2 ¶¶ 5 - 6.) Relator Mayberry now asserts that he "copied the documents [contained on the July flash drive] from the original flash drive onto another flash drive, and provided that to [his] attorneys for production." (Id. ¶ 6.) Notably, however, relator Mayberry never asked his counsel for clarification about how to proceed when faced with seemingly contradictory directions from the Court to produce the original storage device and from relators' counsel to not produce documents relating to the other lawsuit. Relators' counsel has confirmed that no such request for clarification was ever made by relator Mayberry. (See Hr'g Tr. 92:6-16, Aug. 28, 2008.) This new excuse on which relator Mayberry now attempts to rely simply is not credible.

Indeed, relator Mayberry's own counsel repeatedly and explicitly told him to produce the original storage device. Before and after the Court's July 10, 2008 Order, relators' counsel Melissa A. Roover, "repeatedly instructed" relator Mayberry to provide the original storage device to counsel. (Roover Decl. ¶2 (Dkt. No. 356). In response to that direction, relator Mayberry first produced the July flash drive, which turned out not to be the original storage device, as discussed above. Then, sometime

after the July 25, 2008 hearing, relator Mayberry provided his counsel with two additional USB flash drives (the "Oregon drives").[5] According to the Declaration he submitted to the Court on August 22, 2008, relator Mayberry now claims that these two drives are the "original flash drives." (See Mayberry Decl. 2 ¶ 7.) There exists, however, serious doubt as to whether the oregon drives are the original storage devices onto which relator Mayberry allegedly copied the contents of defendant Clark's hard drive, and questions as to whether relator Mayberry may have deleted files on the Oregon drives. Defendant Clark represented that her computer contained multiple emails as well as documents representing nine months of work with Secure Global Distribution (Clark Decl. ¶¶ 4, 19-20), which should have appeared on the Oregon drives if relator Mayberry had copied the contents of Clark's hard drive as he represented both in deposition and by declaration. The Court has

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[5] The Oregon drives are two 256 megabyte portable data storage devices. (Miller Decl. ¶¶ 4-5 (Dkt. No. 356, Ex. 9). In Mr. Miller's report and throughout the August 28, 2008 hearing, these flash drives were referred to as the Oregon I and Oregon 2 flash drives, respectively (collectively, the "Oregon drives"). For the ease of reference, the Court will employ those terms as well.

reviewed the inventory and there appears to be no emails on either of the Oregon drives.[6] Additionally, in a Declaration dated August 25, 2008, defendant Clark stated that she had reviewed the contents of the July flash drive produced by relator Mayberry and that the July drive did not contain any emails or Secure Global Distribution files. (Clark Decl. ¶¶19-20.)

Relators' computer forensic expert, Stevens R. Miller ("Miller"), examined the Oregon drives and conducted a comparison between the files found on the Oregon drives with those found on the July flash drive. In his Declaration to the Court, which accompanied relator Mayberry'S Pre-Hearing Brief, Mr. Miller stated that the Creation Date for the documents on the July

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[6] Relator's computer forensic expert, Stevens R. Miller, testified at the August 28,2008 Sanctions hearing that the" .pst" document file extension is the most common configuration for emails. (Hr'g Tr. 61 :25-62:20, Aug. 28, 2008.) Mr. Miller provided a comprehensive inventory report of all of the files he discovered on the Oregon drives as a result of the forensic examination that he conducted pursuant to relators' request. (Sec Date Inventory for Files on Oregon Flash drive (Aug. 28, 2008 Hr'g, Relators Ex. 3).) The Court has reviewed the inventory report and found no files with a .pst extension.

flash drive is July 14, 2008, which confirms that the July flash drive is not the original storage device. (Miller Decl. ¶12.)

Moreover, there are approximately 48 documents on the July flash drive that do not appear on either of the Oregon drives. (See Id. ¶ 13.) The source of these documents, many of which are alleged to be photographs, is unknown. In his July 16, 2008 Declaration to the Court, relator Mayberry declared that he "did not provide what appeared to be personal files, such as pictures" in response to requests for document production in this case. (Mayberry Decl. 1 ¶ 10.) Now, however, it has been determined that relator Mayberry did produce pictures on the July flash drive, but, according to relators' counsel, they are pictures that did not come from defendant Clark's computer. (See Hr'g Tr. 95:12-96:10, Aug. 28, 2008, in which relators' counsel explains that many of the 48 documents that appear on the July flash drive but on neither of the Oregon drives are photographs from Iraq that relator Mayberry received from colleagues and friends.) Indeed, it now appears that relator Mayberry selectively copied files from multiple unknown sources onto the July flash drive and then falsely represented to the Court in his July 16, 2008 Declaration that the July flash drive was the original storage device containing documents from defendant Clark's computer.

There further exists a serious question as to whether relator Mayberry could have copied files from defendant Clark's hard drive in Iraq as he has repeatedly represented. Indeed, the two 256 MB Oregon 1 and Oregon 2 flash drives do not contain, even together, enough room to hold all of the files on defendant Clark's hard drive as well as the operating system that was on defendant Clark's computer. Relator Mayberry represented in his July 16, 2008 Declaration that he opened the hard drive from defendant Clark's computer in Iraq, "removed the memory chip," placed that "memory chip" in another computer's hard drive and then was able to open all of the files from defendant Clark's hard drive. (Mayberry Decl. 1 ¶ 8.) Relator Mayberry further declared that he "placed all of the hard drive's contents onto a 'flash' or memory stick, made a copy of this memory stick, and sent the original to the United states for safe keeping." (Id. ¶ 9.) Based on the August 28, 2008 testimony of relators' computer forensics expert, Stevens L. Miller, and defendants' computer forensics expert, Brett D. Harrison ("Harrison"), however, it is apparent that relator Mayberry could not have removed the hard drive of defendant Clark's computer and copied the entire contents onto one, or even two, 256 MB flash drives as he has represented to the Court that he did. (Hr'g Tr. 45:16-17; 68:3-69:4, Aug. 28, 2008). Furthermore, relator

Mayberry declared that he removed the "memory chip" from defendant Clark's computer (See Mayberry Decl. 1, 8), but, according to both relators' and defendants' experts, a laptop hard drive does not contain a removable memory chip. (See Hr'g Tr. 45:5-7; 68:1-2, Aug. 28, 2008.)

The existence on the July 10 flash drive of an October 2005 contract highlights yet another inconsistency within relator Mayberry's story. At the August 28, 2008 hearing, defendants introduced into evidence a contract that had been found on the July 10 flash drive. (See Solicitation/Contract/Order for Commercial Items at 2 (Aug. 28, 2008 Hr' g Defs. Ex 1) .) This contract, which forms a basis of relators' allegations against defendants of false claims, is dated October 19, 2005 and purportedly is between defendant Danubia and the United States Government. (See id.) However, the contract, as dated, could not have been copied by relator Mayberry from defendant Clark's hard drive during the summer of 2005. Relator Mayberry only had access to defendant Clark's hard drive in Iraq between ,June 13, 2005 and August 4, 2005 while defendant Clark was on vacation in the United states. The October 2005 contract could not have been copied during the summer of 2005, before the contract even existed.

Notably, the two Oregon drives have never been produced to defendants. Instead,

the single July flash drive was produced and it, admittedly, is not the original storage device and does not contain the exact same files that are on the two Oregon flash drives. Only relators' counsel and relators' expert have had the opportunity to access and review the files on the new Oregon drives. Findings from these examinations have determined that relator Mayberry made several misrepresentations to the Court when (1) he stated in his July 16, 2008 Declaration that the July flash drive was the original storage device and (2) when he represented in his August 22, 2008 Declaration that the Oregon drives are the original flash drives.

Additionally, relator Mayberry produced an incomplete DD-214 discharge form and then delayed production of the complete form for several months.[7] On June

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[7] Relators produced a complete DD-214 form on September 5, 2008, (Dkt. No. 364) nearly two months after the undersigned Magistrate Judge's July 10, 2008 Order to produce the complete form. (Dkt. No. 296). The production of this form does not impact the Court's conclusions because discovery has been closed in this case since June 13, 2008. Additionally, the late production does not cure the previous failure to provide the fonn, especially when its full disclosure raises more serious questions as to

27, 2008, defendants Clark, Danubia, Levinson and Security Ventures moved to compel relators to produce, *inter alia,* relator Mayberry's DD-214 discharge form.

The undersigned Magistrate Judge issued an Order to relators to produce the document. (Dkt. No. 296). Following the July 25, 2008 hearing, the undersigned Magistrate Judge instructed relators' counsel to call chambers with an update on the status of the DD-214 form if it had not been produced by August 1. If the form had not been produced, counsel was also directed to inform the Court when the form was requested and to independently verify that the request had been made.[8] The Court held a telephonic hearing with the parties on August 20, 2008 during which the undersigned Magistrate Judge directed relators' counsel to produce their own request for the DD-214 form. At the August

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Mayberry's truthfulness. (See Defs. Response to Relators' Notice of Filing 3-4 (Dkt. No. 365).).

[8] Relators' counsel assert that they left a detailed message with chambers on August J, 2008. Unfortunately, the Court's phone and voicemail system changed over that day, evidently deleting the message before chambers staff could retrieve it.

28, 2008 Sanctions hearing, relators' counsel notified the Court that they had submitted their own request for a copy of the form to the U.S. Military Records Office on August 18, 2008.[9] Additionally, relators' counsel informed the Court that some time after August 18, 2008 relator Mayberry submitted an online request for the DD-214 form. (Hr'g Tr. 99:3-13, Aug. 28, 2008.) Relators' counsel was unable to verify the date of the submission by Mayberry or the status of the request. (Id. 99:14-100:1.)

Importantly, the portion missing from the bottom of the inaccurate DD-214 discharge form that was first produced directly relates to suspected false representations made by relator Mayberry, including misrepresentations regarding his military experience and medic training. In

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[9] Counsel for relators also produced a copy of a letter they received from the National Personnel Records Center (NPRC), dated August 27, 2008, in response to counsel's request for a copy of the DD-214 form. (Dkt. No. 363, Ex. I.) The NPRC's letter indicated that relator Mayberry's form was loaned to the U.S. Army Human Resources Command and had not yet been returned to the NPRC. (Id.) Since relator Mayberry produced no similar correspondence to his supposed request for the DD-214, the Court is inclined to surmise that relator Mayberry never made the request as he previously represented.

addition to *qui tam* false claims allegations, relator Mayberry has filed several individual claims against defendants alleging *qui tam* retaliation and breach of contract and seeking back pay based on his termination by defendant Danubia. However, relator Mayberry appears to have made a number of false representations as to his military service, including the dates of service, the positions in which he served and his training. Such misrepresentations relate directly to the validity of his individual claims and the recently produced complete DD-214 form does not cure the inconsistencies, and raises new inconsistencies as well.

For example, in his deposition, relator Mayberry claimed that he was a medic with the National Guard for several years (Mayberry Dep. 18-19.) The DD-214 form indicates, however, that relator Mayberry was in fact an Army infantryman for one year and spent no time in the National Guard or as a medic. Relator Mayberry also stated during his deposition that he was trained as an EMT in Oregon (Mayberry Dep. 52-53), but an email from the Office of Public Health in Oregon, which was submitted as evidence by defendants during the August 28 Sanctions hearing, indicates that the Emergency Medical services and Trauma Systems section of the Oregon Public Health Department has "no record of

Rory Mayberry as a First Responder, EMT-Basic, Intermediate, or Paramedic on file." (See Email to Amy Clark from Catherine J. Schmitz (Aug. 8, 2008 Hr'g Defs. Ex. 4).) Relator Mayberry also stated during his deposition and on his job application to defendant Emergent Services that he had previously worked as an apprentice embalmer and apprentice Funeral Director in Oregon. (Mayberry Dep. 39-40; Emergent Business Services Data Collection Form (Aug. 28, 2008 Hr'g Defs. Ex. 8).) Once again, relator Mayberry's assertions are directly contradicted by other evidence. According to records from the Oregon Mortuary and Cemetery Board, submitted to the Court by defendants as exhibits during the August 28 Sanctions hearing, relator Mayberry "was not a licensed embalmer or embalmer apprentice" in the state of Oregon. (Oregon Mortuary and cemetery Board Final Order by Default (Aug. 28, 2008 Hr'g Defs. Ex. 5).)

The Court finds that the misrepresentations and falsities by relator Mayberry appear to be extensive and go to the heart of the matter before the Court.

V. CONCLUSION

Defendants argue that the repeated false assertions in these areas demonstrate that relator Mayberry's representations to the Court regarding the DD-214 discharge form and various flash drives are deliberate,

and not simply the result of a misunderstanding. Such repeated misrepresentations indicate that relator Mayberry did indeed act in bad faith in his interactions with and submissions to the Court. These falsities and deliberate inconsistencies prejudice defendants, who must attempt to defend themselves against serious allegations of submitting false claims to the United States Government. Indeed, it is difficult to overstate the materiality of the evidence that relators have either failed to produce or misrepresented. Relator Mayberry has made extensive misrepresentations about countless pieces of crucial information, from the location and source of the documents he claims to have copied from defendant Clark's computer to his own personal training and experience in the military and medic field. This information forms the basis of several of the false claims allegations and the individual retaliation and breach of contract claims contained in the Complaint.

The Court must be vigilant in deterring and addressing the kind of misrepresentations, falsehoods, and failure to comply with Court order that has occurred in this matter. There appears to be little alternative to harsh sanctions in this instance.

Relator Mayberry is the key witness for relators. He has alleged that he saw and copied the documents upon which the false

claims allegations rely. Relator Isakson, on the other hand, has filed no individual claims and appears to have little knowledge of the facts relating to the Complaint. As the evidence outlined above indicates, relator Mayberry does not appear to be credible in his representations to the Court or to the defendants during discovery. Considering the four factors from the Mutual Federal test and the facts outlined above, dismissal of the Complaint appears to be the most appropriate sanction.

An alternative sanction is to prohibit relator Mayberry from testifying at trial, whether by live testimony or deposition, and prohibit relators Mayberry and Isakson from introducing into evidence documents obtained by or through relator Mayberry. Although relator Isakson could continue to pursue the claims, he should not be allowed to produce any documents or other discovery that he had received from or through relator Mayberry. If the Court chooses this sanction, then the undersigned Magistrate Judge further recommends that relators be compelled to produce the Oregon drives immediately to defendants' counsel, and that relators pay the cost of defendants' expert's review of the Oregon drives.[10]

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[10] Relators' claim of privilege as to some documents on the Oregon drive should be denied as it was not timely raised.

VI. RECOMMENDATIONS

For the reasons discussed above, the severity of the transgressions committed by relators in this matter warrant, and the undersigned recommends, that defendants' Motion for Sanctions be GRANTED, and that relators' claims be dismissed in their entirety, pursuant to Federal Rule of Civil Procedure 37(b) (2). Alternatively, the undersigned Magistrate Judge recommends that relator Mayberry be prohibited from testifying at trial, whether by oral examination or by deposition, and that relator Mayberry be prohibited from introducing into evidence any documents, and that relator Isakson not be allowed to produce any documents that he received from or through relator Mayberry.

Pursuant to Rule 37, defendants are entitled to an award of reasonable expenses and fees associated with the cost of the Motion to Compel and the forensic analysis conducted on the July flash drive by defendants' computer forensic expert. See Fed. R. Civ. P. 37 (a). The undersigned Magistrate Judge finds the defendants' request of $2,590.00 for attorneys' fees and $3,561.60 for the fees and expenses associated with the forensic analysis of the July 10 flash drive by Brett D. Harrison to be reasonable and the Court recommends that relators Mayberry and Isakson, and their counsel, Grayson & Kubli, P.C., jointly and

severally, be ordered to pay the sum of $6,151.60 to defendants' counsel within ten days of the Court's Order.

VII. NOTICE

The parties are advised that exceptions to this Report and Recommendation, pursuant to 28 U.S.C. § 636 and Rule 72(b) of the Federal Rules of Civil Procedure, must be filed within ten (10) days of its service. A failure to object to this Report and Recommendation waives appellate review of any judgment based on it.

The Clerk is directed to send a copy of this Report and Recommendation to all counsel of record and to plaintiffs pro se.

HEARING ON MOTIONS

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA

Alexandria Division

October 10, 2008

Before: Liam O'Grady, Judge

APPEARANCES:

Christian L. Simpson and Melissa Roover, Counsel for Plaintiffs

Peter B. Hutt, II and Amanda R. Johnson, Counsel for Defendants Combs and Windmill International

Craig C. Reilly, Counsel for Defendants Levinson, Clark, Danubia and Security Ventures

E. Andrew Burcher, Counsel for Defendant Johnson

THE CLERK: Civil action 1:06-364, Rory Mayberry, et al. versus Custer Battles, et al.

MR. REILLY: Craig Reilly here for the Danubia defendants.

THE COURT: All right, good morning.

MR. HUTT: Peter Hutt with Amanda Johnson on behalf of defendants Windmill and Combs.

THE COURT: Good morning.

MR BURCHER: Good morning, Your Honor. Andrew

Burcher on behalf of Secretary Johnson.

THE COURT: All right.

MR. SIMPSON: Christian Simpson, Your Honor, Grayson & Kubli on behalf of the Relators, as well as Melissa Roover.

THE COURT: All right, good morning to you both. All right, this comes on the Relators' objection to the report and recommendation from Judge Buchanan recommending the case be dismissed for violations of discovery pursuant to Rule 37. I have read the pleadings, I have read the report and recommendation. I will hear anything additional.

Why don't I hear first from Relators.

MR. SIMPSON: Thank you, Your Honor. May it please the Court, Your Honor, Christian Simpson on behalf of Relators.

As Your Honor mentioned, we are here today on the Relators' Rule 72 objections to Judge Buchanan's report and recommendation concerning discovery disputes. The discovery disputes involve flash drives as well as a DD 214 military history form. The report recommends dismissal of the complaint in its entirety, or in the alternative that Relator

Mayberry be precluded from testifying or using documents.

We have objected to the recommended sanctions on two grounds. One, that the report doesn't properly link Mr. Mayberry's mistake to the defendants' claims of prejudice. And secondly, that the recommended sanctions far exceed what is warranted by the findings.

With the Court's indulgence, just a brief summary of how we got here. Starting first with the flash drives--

THE COURT: You got here because you trusted Mr. Mayberry to be honest in his dealings with you and with the Court, that's how you got here. And you yourself in prior hearings in front of Judge Buchanan indicated that you had counseled Mr. Mayberry on the seriousness of the matter. And that, obviously, he didn't heed your advice. That's why we're here.

MR. SIMPSON: Yes, indeed, Your Honor. And particularly with respect to those flash drives, as you know, we were ordered on the 10th of July to produce the original flash drive to the Court. Mr. Mayberry, who was under a long-standing instruction from another case to not disclose privileged material, sealed materials, had decided that the long-standing instruction coupled with the order were two things that he himself had to harmonize.

THE COURT: That doesn't pass the straight face test. Mr. Mayberry is just grasping for straws after the fact. I believe Judge Buchanan correctly evaluated that excuse

and found it to be just further fraud. Go ahead.

MR. SIMPSON: Well, Your Honor, we would ask the Court to also, respectfully, take into account the representations by affidavit of counsel Alan Grayson who had provided that long-standing instruction to Mr. Mayberry prior to the inception of this particular case.

But even granting that the Court is in agreement with the Magistrate's finding with respect to, with respect to Mayberry and how he decided to provide something other than the original drives, Relators would respectfully argue that the manner in which the sanctions have been apportioned does not square with the conduct, specifically with respect to the DD 214 form which relates to the individual claims as compared to any misconduct that relates to the flash drives.

The flash drives being put on one side affecting any claims having to do with the False Claims Act and the DD 214 form, again, having direct relationship with the individual claims.

So, for Relators, Your Honor, again, this comes back to the issues of prejudice. And with respect to the flash drives, again, accepting that the Court has agreed with Judge Buchanan's finding, we are still at a loss to say what exactly the prejudice is on the defendants in this matter. And the focus for us particularly is on this notion that the

defendants have been deprived of any documents.

During the course of that hearing, Your Honor, we had withheld the actual Oregon drives because we were concerned about potentially privileged material. The Court indicated that certain documents it would rule as privileged, others it would not. We were amenable then to providing these Oregon drives per the Court's instructions, and we are amenable today to do so and stand ready to provide that to the Court.

But when it comes to extrapolating, which defendants have certainly spun a whole number of theories as to what else could be out there with respect to documents that Mr. Mayberry obtained, we would respectfully submit that the documents related to Danubia are documents that aren't irretrievably lost. I am sure the Court has been briefed on our papers. We would submit that Ms. Clark was not the soul repository of all the documents at Danubia. Particularly because they are very important documents, we find it hard to believe that she would be the only individual that had copies of contracts, that she e-mailed only herself, et cetera.

It simply would defy logic that this big company would not have an IT department, would not have a server upon which all these e-mails, et cetera, also resided.

So, from our perspective, the tales that have been spun about what could be out

there and the prejudice that could be visited because of potentially exculpatory information simply don't square with the reality of how a business runs, how communications are transmitted one to the other, et cetera.

And so for that reason, when we look at the Mutual Federal test with respect to prejudice, we don't spin the same fanciful theories about what could have been and what might not have been.

Now, the sanctions that have been proposed by the Magistrate Judge are, again, that you have entire dismissal of the case. We respectfully disagree with that primarily because, as the Court knows and has seen through briefing, we have already submitted a motion for partial summary judgment on liability largely based on the fact that through discovery the claims that we allege in the amended complaint have been borne out by documents that have been produced.

And so, from our perspective, this notion that the case is without merit is simply misfounded. Part of the argument there has been that Relator Isakson is not part of this case. And given what the sanction of entire dismissal of the case would mean, obviously he would be prejudiced, he would be prejudiced in a great way. He has not been involved in this misconduct by the other Relator, and yet he is an individual that was the one who first uncovered the scheme to defraud the Government.

So, Your Honor, we would submit that with respect to the False Claims Act claims that are present in this complaint, the dismissal of the entire complaint would, first and foremost, not square with the potential prejudice that is there and, secondly, it would obviously punish this second Relator.

Now, I mentioned the DD 214 form earlier. As far as that is concerned, the relationship between the DD 214 form and the claims are centered again upon those individual claims. Those claims have only been lodged against the Danubia defendants, they have not been proffered against the Windmill defendants or Mr. Custer, et cetera.

So, as far as we are concerned, the focus there should be on the conduct in terms of the--

THE COURT: What's left of your case if Mayberry is precluded from testifying and any documents, anything that he brought to the case is stricken? What's left of the case?

MR. SIMPSON: There is still a tremendous amount left, Your Honor. As we--

THE COURT: What does Isakson bring personally to your case? I mean, the complaint, the amended complaint mentions his name once. What does he bring?

You have to have somebody, you have to have the sponsor when you are dealing with the statute. What you have you got left?

MR. SIMPSON: For sure. The Relator Mr. Isakson brings, first and foremost, as we said, evidence that he was the first person to truly uncover the scheme.

THE COURT: What scheme is that?

MR. SIMPSON: The scheme by Danubia, or Custer Battles to use Danubia as a sham company to defraud the government, to bypass the suspension order of Custer Battles.

THE COURT: Okay.

MR. SIMPSON: Mr. Mayberry was not aware of that scheme until he got to Iraq. By contrast, Relator Isakson became aware of it as he was pursuing monies that he had lost to Custer Battles via contract in Iraq.

And so, again, to devalue his role at the inception of this case is, we think, misplaced and inappropriate. He is the individual who first identified and uncovered this scheme.

And then beyond that, to continue answering your question, as we just mentioned, through the course of discovery there has been evidence primarily coming from discovery that validates so many of the things that were alleged in the complaint with respect to the relationships between Mr. Custer and Danubia, the relationships between Windmill and Danubia, so on and so forth. Mr. Custer's role as a principal in Danubia, Mr. Custer's role at Windmill, all

these things which we believe are more than probative of liability and as we have briefed the Court with respect to summary judgment.

THE COURT: All right, thank you, Mr. Simpson.

Mr. Reilly, do you want to be heard first? Or you can speak on behalf of all if you feel that's appropriate.

MR. REILLY: All right. Your Honor, we have extensively briefed this, and I sort of struggle to find a place to begin. I thought maybe we should begin in 2005.

Mr. Mayberry applied for a position with my client, government contractors operating in Iraq, as a medic. He had no qualifications for that job whatsoever, including lying about his military training as a medic. Iraq in 2005 was a very dangerous place to pretend to be a medic because people were not just pretending to be killed and wounded.

That was simply the beginning of the lies here that he has told extensively in discovery. In his filings with the Court we have identified at least three declarations that are false and shown the falsity in each of them.

When he was fired for cause in November of 2005, I believe he immediately came back to the United States, contacted counsel, prepared this case. If you recall, my

first involvement with this case was with the default judgment that they sought for failure to answer timely. He sues as a qui tam plaintiff seeking three times the contract values plus penalties, and he brings his individual claims for back pay and damages.

And let me just focus on those retaliation claims and the DD 214 form briefly, if I may. He seeks claims for retaliation, breach of contract, conversion, all premised on his allegation that he was a qualified medic and seeks over $300,000 in damages on those counts, which are Counts 10 through 12.

We requested the DD 214 form. It was not produced. After the close of discovery it still had not been produced. We were allowed to take Mr. Mayberry's deposition after the cutoff when he identified that he did have his DD 214 form still, but he claimed it was inaccurate and he had applied for a new one.

Well, there has been no evidence that he applied for a new one. Deposition testimony reveals that he repeatedly lied to us in the deposition under oath about his military training and service, his civilian training as an EMT. And there are numerous and outrageous lies about his qualifications that we have enumerated in the brief. All were disproven by the documentary evidence including the DD 214 form.

It had been suppressed during the discovery period. There was a dilatory

conduct by Relators' counsel as well as Mr. Mayberry himself to obtain the true copy. They still have not produced a copy.

The copy produced to the Court when they filed it recently was the one provided by the AUSA who, at the instruction of the Magistrate Judge, used his good offices to get a copy. It showed even more lies as we have outlined in the papers.

So, we have the suppression of the evidence during discovery, disobedience of the July 10 order, false declaration of compliance, which is docket entry number 318, willful refusal by both Mayberry and his counsel to obtain and provide and they still have not provided this form themselves.

I think this is more than ample grounds to dismiss the individual counts because there have been repeated lies and bad faith during discovery. The prejudice to us is that relevant evidence was suppressed, altered, delayed in production until after the cutoff, forcing the defendants literally to untangle all these lies that shouldn't have been asserted in the first place.

The deterrence is necessary here, the third factor under the Mutual case. This is so flagrant and so defiant that the Court must send a message with this.

Lesser sanctions, another consideration, none have worked so far. Why do we think that saying, letting them off here is somehow going to be sufficient?

And even the lesser sanction recommended by the Magistrate Judge, do you really think Mayberry would come to testify at trial anyway where we could impeach him with all of this evident? No, no. They are going to try put on their case some other way.

And let me just mention that too. Mr. Isakson, we have submitted his deposition to the Court, his deposition is sort of one long nonanswer, but he was not involved. They say he is not involved in any of this false filing. Well, once he learned of all the false filings by Mayberry, he also didn't seek separate counsel, distance himself, take a position paper in the case, separate himself from Mr. Mayberry.

So, if his claims get dismissed too as a Relator, I don't think the Court should have any regret. He seems to have no regret to be tied still with Mr. Mayberry.

They say they have a strong case on the merits. Well, we have moved for summary judgment as well. We think the only claim that they have even attempted to present evidence on, and which still is a fatally defective claim, concerns the Falcon contract.

One of the contracts on which they sought default judgment, as the Court recalls, is the SERKA contract, S-E-R-K-A contract. And Mr. Mayberry in October of 2007 submitted a very detailed declaration, all of it false, showing the nature and extent

of the performance under the SERKA contract, the formation of the SERKA contract, what the documents were, what the invoices were. They sought $2.1 million then to be trebled as their damages under the SERKA contract.

We have moved for summary judgment on the SERKA contract, and they have not opposed it. There was no SERKA contract. He made similar false statements in that same declaration about the Falcon contract.

Your Honor, we think that summary judgment should be entered for the defendants and that this is another, these proceedings today are another means by which the Court can dispose of this case.

We sought-- And the Court should also recall what the amended complaint is. My clients in particular were accused of having conspired with the former Custer Battles people to create a sham company to continue on Custer Battles' businesses, but also to have stolen weapons and vehicles, sold them into the black market so they could be used to kill American soldiers.

Mr. Mayberry, when we finally disposed him, said, oh, yeah, that's all on the hard drive that he stole from Ms. Clark's computer. All that evidence is there. Well, none of that has been produced.

If you recall, the amended complaint lavishly quotes from and cites to government contracts. We got their document production.

Not a single contract. Where did all of this come from? Well, either Mr. Mayberry has it or he never had it. If he has it, we still haven't seen it.

They say, well, we produced the Oregon flash drives, that is the original source. They are making that with the same representation today, that they made with the same certainty they made their representations to Magistrate Buchanan earlier in this case with respect to the flash drive which they now concede is a phony.

Well, the Oregon flash drives cannot be the original source because there are 48 documents on the thumb drive, the memory stick that was produced in July that aren't found anywhere on the Oregon flash drives, including a contract that was put in issue in this case by them. There is some other source out there somewhere that Mayberry still hasn't turned over. This trust Mayberry or now trust me because I am Mayberry's counsel argument shouldn't work.

I think, Your Honor, here what you have heard is, again, the defendants aren't prejudice. And I think we have shown in the papers and I can explain further if the Court has other questions, but certainly based on what I have even just now disclosed, this is a situation in which prejudice has been shown, bad faith has been shown. Deterrence, the need for deterrence is really the driving factor here with the repeated false filings with the Court. And the fact that these lesser

sanctions which the Magistrate Judge tried and tried again, none of them have worked.

Now, this final argument that was made this morning, a new one, is that, well, Danubia is a big company, it has an IT department and certainly these documents are available on some server somewhere. Ms. Clark lived in a hut, the company was a laptop, and she was in Iraq in a war zone. That's not a big company. She was our person handling these contracts.

Mr. Mayberry concedes that he took her computer, downloaded and erased it without her permission. And she has put in a declaration about that. When confronted by her, he claimed to have made no copies of it. And it supposedly would have held, even according to him, documents from Danubia, from Custer Battles and other documents here.

Again, the documents that have been produced, the memory stick and the Oregon drives, are not from her computer. Where are they from? Again, we have no answers to this.

So, I think the prejudice here goes beyond just that it was a late production of some relevant documents. There is still a nonproduction of a lot of relevant material that even Mr. Mayberry claims is out there in his sworn deposition testimony.

I think when you weigh the four factors, the Magistrate Judge got it exactly

right in recommending dismissal of all the claims.

Thank you.

THE COURT: All right, thank you. Anyone else want to speak?

MR. HUTT: Nothing further, Your Honor.

MR. BURCHER: No.

THE COURT: All right. I have never seen a case with abuses like this go to a stage where we are today. I think that Mr. Grayson and Mr. Kubli have completely abrogated their positions as officers of this court. Being an advocate is one thing. Allowing a plaintiff like Mr. Mayberry, who couldn't tell the truth if it would help him, he is a pathological liar-- Why he hasn't been indicted for his testimony under oath before Congress is a mystery to me.

But the foundation of Judge Buchanan's decision is one built on the repeated discovery abuses that were perpetrated by Mayberry in his three false affidavits.

And before I forget it, Mr. Sponseller, I want the U.S. Attorney's Office to investigate why Mr. Mayberry shouldn't be indicted for false statements in this case.

He has thwarted discovery. As I think Mr. Reilly has clearly and concisely stated, who knows where the original documents are that came from Ms. Clark's computer when he stole its contents a year-and-a-half ago. They are certainly not the Oregon flash

drives. They are not the earlier drives that he provided.

His willingness to lie to his counsel repeatedly. There is no question that he ginned up the DD 214 form to try and prevent discovery about how many lies he had talked about in his own background.

He has thwarted important discovery, not tangential discovery, but very core discovery that his case is built on. Each of the defendants has no opportunity to properly defend the action in such a state.

The SERKA contract is astonishing in the lies that were alleged in making the claim for the money in the SERKA contract, and the Falcon contract is worthy of almost no belief as well based on Mr. Mayberry's testimony.

The liability was far from clear. And the pleadings filed in the dispositive motions stage were being closely considered not on Mr. Mayberry's behalf, but on defendants' behalf when this motion came before me. I think that Judge Buchanan got it 100 percent correct. I affirm and adopt her report and recommendation.

I have looked carefully at Mr. Isakson's deposition testimony and his contribution to this case. I find that he could not have brought this case as a qui tam plaintiff without Mr. Mayberry's support in the form of the lies that Mayberry represented to be accurate.

That not only that, he has been part and parcel to the activity of Mayberry, and that the sanction of dismissal is appropriate for that reason as well.

So, I am going to dismiss this case in its entirety with prejudice.

I find also that the sanction imposed against Mr. Mayberry and Grayson & Kubli jointly and severally is totally appropriate. As I said, I find that this case should have been voluntarily dismissed months ago, if it should have been brought at all.

And that Mr. Simpson, while you were diligent in attempting to obtain discovery and counsel Mr. Mayberry, that experienced counsel, as Mr. Grayson and Mr. Kubli are, should be aware of their roles as officers of this court and recognize, should have recognized far earlier than the last several weeks that they had a client who was unreliable, untruthful, and that the case should have been dismissed as a result.

So, I will affirm Judge Buchanan's ruling in every respect. Thank you all.

MR. REILLY: Thank you, Your Honor.

MR. HUTT: Thank you, Your Honor.

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 08-2191

RORY MAYBERRY, United States ex rel.; ROBERT ISAKSON,

United States ex rel.,

Plaintiffs – Appellants,

and

UNITED STATES OF AMERICA,

Party-in-Interest,

v.

MICHAEL BATTLES; SECURITY VENTURES INTERNATIONAL, LIMITED; DANUBIA GLOBAL, INCORPORATED; RICHARD LEVINSON; AMY CLARK; WINDMILL INTERNATIONAL, LIMITED; HANSFORD T. JOHNSON; DOUGLAS COMBS; SCOTT CUSTER,

Defendants – Appellees,

CUSTER BATTLES, LLC,

Debtor – Appellee,

and

EMERGENT BUSINESS SERVICES; TARHEEL TRAINING, LLC; ROB ROY TRUMBLE; SALLYPORT GLOBAL HOLDING, LLC; JOSEPH MORRIS; JOHN DEBLASIO,

Defendants.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria. Liam O'Grady, District Judge. (1:06-cv-00364-LO-TCB)

Case: 08-2191 Document: 29

Submitted: April 27, 2010 Decided: May 21, 2010

Before KING, SHEDD, and DAVIS, Circuit Judges.

May 21, 2010

Affirmed by unpublished per curiam opinion.

Victor Aronoff Kubli, KUBLI & ASSOCIATES, P.C., Vienna, Virginia, for Appellants. Craig Crandall Reilly, Alexandria, Virginia; Peter Barton Hutt, II, Duncan Stevens, AKIN, GUMP, STRAUSS, HAUER & FELD, LLP, Washington, D.C.; Eugene Andrew Burcher, WALSH COLUCCI LUBELEY EMRICH & WALSH, PC, Prince William, Virginia; Scott Custer, Bradenton, Florida, for Appellees.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Rory Mayberry and Robert Isakson appeal the district court's order accepting the recommendation of the magistrate judge, granting the motion for Fed. R. Civ. P. 37 sanctions, dismissing this action with prejudice, and awarding reasonable expenses and fees to Defendants. We have reviewed the record and find no reversible error. Accordingly, we affirm for the reasons stated by the district court in its opinion from the bench. *Mayberry v. Battles*, No. 1:06-cv-00364-LO-TCB (E.D. Va. Oct. 10, 2008). We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 08-2191
(1:06-cv-00364-LO-TCB)

RORY MAYBERRY, United States ex rel.;
ROBERT ISAKSON, United
States ex rel.
Plaintiffs - Appellants
and
UNITED STATES OF AMERICA
Party-in-Interest
v.
MICHAEL BATTLES; SECURITY
VENTURES INTERNATIONAL, LIMITED;
DANUBIA GLOBAL, INCORPORATED;
RICHARD LEVINSON; AMY CLARK;
WINDMILL INTERNATIONAL, LIMITED;
HANSFORD T. JOHNSON; DOUGLAS
COMBS; SCOTT CUSTER
Defendants - Appellees
CUSTER BATTLES, LLC
Debtor - Appellee
and
EMERGENT BUSINESS SERVICES;
TARHEEL TRAINING, LLC; ROB ROY
TRUMBLE; SALLYPORT GLOBAL
HOLDING, LLC; JOSEPH MORRIS; JOHN
DEBLASIO
Defendants

ORDER

Aug. 27, 2010

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Shedd and Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

(a) IN GENERAL. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following

items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations—stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) PROCEDURE.

(1) *Contents of the Request.* The request:

(A) must describe with reasonable particularity each

item or category of items to be inspected;

(B) must specify a reasonable time, place, and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically

stored information is to be produced.

(2) *Responses and Objections.*

(A) *Time to Respond.* The party to whom the request is directed must respond in writing within 30 days after being served. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) *Responding to Each Item.* For each item or category, the response must either state that inspection and related activities will be permitted as requested or state an objection

to the request, including the reasons.

(C) *Objections.* An objection to part of a request must specify the part and permit inspection of the rest.

(D) *Responding to a Request for Production of Electronically*

Stored Information. The response may state an objection to a requested form for producing electronically stored information.

If the responding party objects to a requested form—or if no form was specified in the request—the party must state the form or forms it intends to use.

(E) *Producing the Documents or Electronically Stored Information.*

Unless otherwise stipulated or ordered by the court, these procedures apply to

producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) NONPARTIES. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Mar. 30, 1970, eff. July

1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Mar. 2, 1987, eff. Aug. 1, 1987;

Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr.

12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

(a) MOTION FOR AN ORDER COMPELLING DISCLOSURE OR DISCOVERY.

(1) *In General.* On notice to other parties and all affected persons, a party may move for an order compelling disclosure or discovery. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make disclosure or discovery in an effort to obtain it without court action.

(2) *Appropriate Court.* A motion for an order to a party must be made in the court where the action is pending. A motion for an order to a nonparty must be made in the court where the discovery is or will be taken.

(3) *Specific Motions.*

(A) *To Compel Disclosure.* If a party fails to make a disclosure required by Rule 26(a), any other party may move to compel disclosure and for appropriate sanctions.

(B) *To Compel a Discovery Response.* A party seeking discovery may move for an order compelling an answer, designation, production, or inspection. This motion may be made if:

(i) a deponent fails to answer a question asked under

Rule 30 or 31;

(ii) a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a)(4);

(iii) a party fails to answer an interrogatory submitted under Rule 33; or

(iv) a party fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

(C) *Related to a Deposition.* When taking an oral deposition, the party asking a question may complete or adjourn the examination before moving for an order.

(4) *Evasive or Incomplete Disclosure, Answer, or Response.* For purposes of this subdivision (a), an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond.

(5) *Payment of Expenses; Protective Orders.*

(A) *If the Motion Is Granted (or Disclosure or Discovery Is Provided After Filing).* If the motion is granted—or if the disclosure or requested discovery is provided after the motion was filed—the court must, after giving an opportunity to be heard, require the party or deponent whose conduct necessitated the motion, the party or attorney advising that conduct, or both to pay the movant's reasonable expenses incurred in making the motion, including attorney's fees. But the court must not order this payment if:

(i) the movant filed the motion before attempting in good faith to obtain the disclosure or discovery without court action;

(ii) the opposing party's nondisclosure, response, or objection was substantially justified; or

(iii) other circumstances make an award of expenses unjust.

(B) *If the Motion Is Denied.* If the motion is denied, the court may issue any protective order authorized under

Rule 26(c) and must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party or deponent who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

(C) *If the Motion Is Granted in Part and Denied in Part.* If the motion is granted in part and denied in part, the court may issue any protective order authorized under Rule 26(c) and may, after giving an opportunity to be heard, apportion the reasonable expenses for the motion.

(b) FAILURE TO COMPLY WITH A COURT ORDER.

(1) *Sanctions in the District Where the Deposition Is Taken.* If the court where the discovery is taken orders a deponent to be

sworn or to answer a question and the deponent fails to obey, the failure may be treated as contempt of court.

(2) *Sanctions in the District Where the Action Is Pending.*

(A) *For Not Obeying a Discovery Order.* If a party or a party's officer, director, or managing agent—or a witness designated

under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

(B) *For Not Producing a Person for Examination.* If a party fails to comply with an order under Rule 35(a) requiring it to produce another person for examination, the court may issue any of the orders listed in Rule 37(b)(2)(A)(i)–(vi), unless the disobedient party shows that it cannot produce the other person.

(C) *Payment of Expenses.* Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(c) FAILURE TO DISCLOSE, TO SUPPLEMENT AN EARLIER RESPONSE, OR TO ADMIT.

(1) *Failure to Disclose or Supplement.* If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(B) may inform the jury of the party's failure; and

(C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).

(2) *Failure to Admit.* If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting

party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof. The court must so order unless:

(A) the request was held objectionable under Rule 36(a);

(B) the admission sought was of no substantial importance;

(C) the party failing to admit had a reasonable ground to

believe that it might prevail on the matter; or

(D) there was other good reason for the failure to admit.

(d) PARTY'S FAILURE TO ATTEND ITS OWN DEPOSITION, SERVE ANSWERS TO INTERROGATORIES, OR RESPOND TO A REQUEST FOR INSPECTION.

(1) *In General.*

(A) *Motion; Grounds for Sanctions.* The court where the action is pending may, on motion, order sanctions if:

(i) a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)—fails, after being served with proper notice, to appear for that person's deposition; or

(ii) a party, after being properly served with interrogatories under Rule 33 or a request for inspection under Rule 34, fails to serve its answers, objections, or written response.

(B) *Certification.* A motion for sanctions for failing to answer or respond must include a

certification that the movant has in good faith conferred or attempted to confer with the party failing to act in an effort to obtain the answer or response without court action.

(2) *Unacceptable Excuse for Failing to Act.* A failure described in Rule 37(d)(1)(A) is not excused on the ground that the discovery sought was objectionable, unless the party failing to act has a pending motion for a protective order under Rule 26(c).

(3) *Types of Sanctions.* Sanctions may include any of the orders listed in Rule 37(b)(2)(A)(i)–(vi). Instead of or in addition to these sanctions, the court must require the party failing to act, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

(e) FAILURE TO PROVIDE ELECTRONICALLY STORED INFORMATION.

Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(f) FAILURE TO PARTICIPATE IN FRAMING A DISCOVERY PLAN. If a party or its attorney fails to participate in good faith in developing and submitting a

proposed discovery plan as required by Rule 26(f), the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

(As amended Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Oct. 21, 1980, eff. Oct. 1, 1981; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007.)

PROOF OF SERVICE

I certify that, on or before the 28th day of January, 2011, I shall have caused three copies of the foregoing petition to be served as indicated upon:

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Victor A. Kubli
January 27, 2011